

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Marilou Bautista

VISA APPLICANTS: Mr Arnold Sardillo
Miss Maybelle Sardillo
Miss Sandra Mae Sardillo
Miss Marielle Sardillo

CASE NUMBER: 1515755

DIBP REFERENCE(S): OSF2012/044956

MEMBER: Hugh Sanderson

DATE: 4 April 2016

PLACE OF DECISION: Sydney

DECISION: The tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations;
- cl.309.221 of Schedule 2 to the Regulations; and
- r.2.03A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 April 2013 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (hereinafter "the visa applicant") applied for the visa on 9 January 2013 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because the delegate was not satisfied that the applicant was the de facto partner, as defined in s.5CB of the Act, of the sponsoring partner.

BACKGROUND

4. The visa applicant is a citizen of the Philippines and is currently 47 years old. The second named visa applicants are his children. He has four children, Jobelle currently 22 years old, Marybelle currently 20 years old, Sandra currently 16 years old, and Marielle currently 15 years old. The second named visa applicants have never travelled to Australia.
5. The visa applicant entered Australia on 18 October, 2006 holding a subclass 457 Temporary Work visa. This visa expired on 18 January, 2007. The visa applicant remained in Australia after that date as an unlawful noncitizen. The applicant did not depart Australia until 31 December, 2012.
6. The review applicant was born in the Philippines and is currently 49 years old. She was previously married to Novado Bautista who sponsored her for a Spouse visa which was granted to her. She became an Australian citizen on 24 November, 1993. A copy of her Certificate of Australian Citizenship has been provided to the department. There were two children of the relationship, Robert currently 19 years old, and Oliver currently 16 years old.
7. The visa applicant claimed that after arriving in Australia by himself his wife contacted him and told him that she was leaving him. He claimed that because of this he decided not to return to the Philippines, despite leaving his four children there. He claimed that he did not work in Australia and was dependent upon the support of friends.
8. The parties claimed that they first met each other on 18 October, 2010 when the visa applicant had his hair cut by the review applicant in her hairdressing business run out of her home. They claimed they became "boyfriend and girlfriend" on 3 November, 2010 and on 8 November, 2010 the visa applicant started living with the review applicant in her home with her two children.
9. The parties claimed that they lived together in the applicant's home after that date. It was claimed that the visa applicant did not work and that the review applicant worked as a hairdresser, cleaner and as an agent for Lifevantage. The visa applicant presented himself to the department in December 2012 and the parties returned together to the Philippines on 31 December, 2012. The current application was filed on 9 January, 2013.

10. The parties provided a number of documents in support of the application. This included the following:
 - Joint Commonwealth Bank account opened 6 December, 2010;
 - Origin Energy account dated 3 October, 2012;
 - Money transfers from the visa applicant and/or the review applicant sending money to the Philippines to the visa applicant's daughter or mother;
 - Two receipts from Dick Smith for mobile phones, one in the name of the visa applicant issued at 1:16pm on 18 October, 2011 and one in the name of the review applicant issued that 1:14pm on 18 October, 2011 with the address provided being the visa applicant's home address;
 - Photos of the parties together; and
 - Correspondence by way of cards, email and letters to the parties.
11. The visa applicant was interviewed by the department on 3 April, 2013. During this interview, the visa applicant made the following claims:
 - He separated from his wife in 1998, later changing this to claim that he separated in 2008;
 - He has four children from that relationship, two of whom are living with their mother;
 - When he travelled to Australia he did so on a 456 visa even though he did not intend to work but because his agent said that it would be easier to get the visa that way;
 - His wife did not travel with him as she had to attend to their business;
 - He did not return to the Philippines as his wife had said that she was in another relationship and he did not return to the Philippines because he may "might resort to killing her";
 - While in Australia he did not work and was supported by and lived with friends;
 - The visa applicant would assist the review applicant in her home cleaning work; and
 - They were able to open a joint bank account together because they had a friend who was able to "fix" it for them.
12. The delegate who considered the application noted the following issues:
 - There was no information which would indicate any financial aspects of the relationship after the visa applicant returned to the Philippines;
 - The fact that the visa applicant said there able to find somebody to "fix" the opening of a joint bank account calls into question the credibility of that bank statement;
 - There was no information which would indicate the parties had pooled their financial resources at any time;

- There was no substantive evidence to show that the parties had shared household activities or established a household together;
 - There was no evidence of any joint leases or ownership of joint property;
 - Statements had been provided by friends as to the social aspects of the relationship, however, there was no independent information as to their claims; and
 - There was insufficient evidence to support the claim that the parties had been in a de facto relationship since 2010.
13. Taking these factors into consideration, the delegate was not satisfied that the parties were in a genuine and continuing relationship at the time of the application or time of the decision. Accordingly, delegate found that the visa applicant was not the de facto partner of the review applicant as defined in s.5CB of the Act and therefore the visa applicant did not satisfy the criteria in cl.309.211 and cl.309.221 and refused the application.
14. An application for a review of that application was made to the tribunal (differently constituted). The applicant provided a variety of documents to the tribunal in support of the application. This included the following:
- The review applicant's telephone account showing calls made to the visa applicant;
 - Evidence the parties travelled together in the Philippines and Hong Kong;
 - Photos of the parties together with family members;
 - Statement from Maharlika Organisation dated 12 May, 2013 claiming that the parties had been members of their organisation since 2011;
 - Statements from the review applicant's children and mother; and
 - Copies of email correspondence between the parties.
15. The tribunal affirmed the department's decision refusing the grant of the visa to the visa applicant. This decision was appealed by the review applicant and, by consent, the decision was remitted for further hearing before the tribunal.
16. The review applicant, since commencing her claimed relationship with the visa applicant, has travelled overseas as follows:
- From 31 December, 2012 to 1 February, 2013;
 - From 14 May, 2013 to 5 June, 2013;
 - From 9 January, 2014 to 10 February, 2014;
 - From 3 April, 2014 to 10 April, 2014; and
 - From 1 May, 2015 to 3 June, 2015.
17. The applicant provided further documents in support of the application including the following:
- Telephone records;

- Correspondence including cards Internet chat details and letters sent to each other;
- Evidence of international money transfers from the review applicant to the visa applicant;
- Photos of the parties together and with family members in the Philippines; and
- Statements of friends and relatives in support of the application.

THE HEARING

18. The review applicant appeared before the tribunal on 1 April, 2016 to give evidence and present arguments. The tribunal also received oral evidence from the visa applicant. The review applicant was represented in relation to the review by her registered migration agent who attended the hearing.
19. The parties provided consistent information as to various aspects of their relationship. This included information as to who was living in the home they shared together in Sydney, the arrangements the review applicant's children have with their father, various activities of the review applicant's children and arrangements made for the visa applicant's children in the Philippines. They provided consistent information as to their plans for their future together if the visa is granted.
20. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in the present case is whether the visa applicant is the de facto partner of the review applicant as defined in s.5CB of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

22. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the de facto partner of the review applicant who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

23. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
24. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

FINANCIAL ASPECTS OF THE RELATIONSHIP

25. The parties claimed that the visa applicant did not work at any time he was living in Australia. It was acknowledged, however, that he was "assisting" the review applicant in her cleaning work. This, it was claimed, was the only income that the visa applicant had and was only minimal. He had no personal savings or any other assets in Australia.
26. The parties opened a joint bank account on 6 December, 2010. This was less than two months after the parties first met each other and less than a month after the parties claimed to have commenced living together. Only limited information has been provided as to the activity in that account for the first 12 months. This shows five deposits in the account in the first two months and one withdrawal. There is no further activity in the account for the balance of that statement which ends on 6 June, 2011. The next statement provided commences 7 December, 2011 and, based on the balance in the account at that time, it appears that the account was not used for the previous six months.
27. There appears to be no genuine reason why this account was opened. The visa applicant was not earning any income and was claiming to be fully dependent upon the review applicant. The review applicant had at the time of opening the account three accounts in her own name which she had in the past and continued to use to meet all the expenses of the household and had any income she received deposited.
28. The review applicant claimed they opened the account in preparation of the time when they believed the visa applicant would be returning to Australia and then have work rights and so be able to deposit his income into that account. The visa applicant claimed it was a joint decision to open the account so that the review applicant could pay for the bills she received and that any joint income they had could be deposited. Neither of these explanations is plausible based on the use of that account for the first 12 months after it was opened.
29. If the account were being opened in anticipation of the visa applicant returning to the Philippines and then being granted a visa and returning to Australia, there is no reason why the account would have been opened immediately after the parties claimed to have started living together and with the visa applicant showing no intention to return to the Philippines at that time. There is no reason why the parties would open a joint bank account to make it easier for the review applicant to pay bills for the household when she had previously been doing so from her own bank accounts where her income was deposited. As there is no evidence of any joint income for the 12 months after the account was opened, the claim that it was open specifically to allow these deposits to be made is not plausible.
30. The tribunal finds that the opening of the joint bank account was a deliberate manipulation by the visa applicant to try to create documentation to support the claim that the parties were in a relationship and is not a genuine reflection of any of the financial aspects of the relationship or that the parties were in a genuine and continuing relationship at that time. That the parties were willing to open this joint bank account undermines the credibility of both the visa applicant and the review applicant.
31. The parties claimed that the review applicant was giving money to the visa applicant in order to send to his family in the Philippines. There is no the documentation to support this claim.
32. Over the period that the parties claim to have been living together in Australia, it is claimed that the visa applicant was not working and was financially dependent upon the review applicant. As neither the visa applicant nor the review applicant have any begin assets of their own, is not surprising that there is no evidence of any joint assets and as the visa applicant was an unlawful noncitizen at that time it is not surprising that there are no joint

liabilities for utilities or any other services. Since returning to the Philippines the review applicant has been sending money to the visa applicant for his financial support.

33. Overall, there is limited information as to the financial aspects of the relationship. The tribunal accepts that the visa applicant was financially dependent upon the review applicant when the parties were living together and the visa applicant was an unlawful noncitizen in Australia.

HOUSEHOLD

34. The parties have claimed that they commenced living together on 8 November, 2010, less than one month after first meeting each other. The parties lived together in the review applicant's rented accommodation until the visa applicant returned to the Philippines on 31 December, 2012. During that hearing before the tribunal, the parties provided consisted information as to different aspects of their lives together, including their work and the activities of the review applicant's children.
35. As set out above, the tribunal finds that the opening of the joint bank account on 6 December, 2010 was a deliberate action by the parties to generate a document to support the claims of the parties being in a genuine relationship but without any genuine purpose for opening that account. The fact that this account was opened at that time does, however, support the claim that the parties knew each other and had commenced some sort of relationship at that time.
36. Over the time the visa applicant was in Australia, he was involved in the lives of the review applicant's children and participated in their care and support.
37. The tribunal finds that the parties were living together in the household of the review applicant from November 2010 until the visa applicant's return to the Philippines in December 2012. Since then, the review applicant has travelled to the Philippines to be with the visa applicant on five occasions, including returning to the Philippines with the visa applicant in December 2012. The tribunal finds that when the review applicant has travelled to the Philippines she has stayed with the visa applicant and they have maintained a household together in the Philippines.
38. Overall, the tribunal finds the parties did established a household together in Australia over the period of the applicant was an unlawful noncitizen. Further, the tribunal finds the parties live together in a single household in the Philippines when the review applicant has travelled there. The evidence presented with respect to the nature of the household of the parties indicates they are in a genuine and continuing relationship.

SOCIAL ASPECTS OF THE RELATIONSHIP

39. The parties provided photos of themselves together in the Philippines together with family members of the visa applicant and the review applicant. Statements had been provided by friends and relatives, including the review applicant's children stating that the parties presented themselves as being in a committed relationship and that they are accepted as being a couple.
40. Overall, the evidence supports a finding that the parties represent themselves as being in a de facto relationship and that this relationship is recognised and accepted by their friends and relatives as being genuine.

NATURE OF THE COMMITMENT TO EACH OTHER

41. The parties claim to have met each other on 18 October, 2010 and commenced living together in a de facto relationship less than three weeks later on 8 November, 2010. The very short period between the parties first meeting each other and claiming to have commenced a committed relationship with each other calls into question the genuineness of the relationship.
42. The parties claim to have been in a relationship now for over five years. For two of those years the parties were living together in Australia and for over three of those years the parties have lived separately with the visa applicant returning to the Philippines. The review applicant has travelled to the Philippines on five occasions over that period to spend time with the visa applicant. Arrangements had been made for the review applicant to return to the Philippines to be with the visa applicant in March 2016, however, these were postponed in light of the tribunal organising the hearing.
43. The parties were able to provide details of each other's lives indicating a high degree communication between them. The statements from the review applicant's children indicate the high degree of emotional support the review applicant gains from the visa applicant.
44. Overall, the tribunal finds that the parties provide each other the degree of companionship and emotional support which would be expected in a genuine and continuing relationship.

OTHER RELEVANT CONSIDERATIONS

45. The visa applicant's immigration history in Australia does him no credit. The tribunal finds that when he arrived in Australia he had no intention to comply with the visa granted to him and it was his intention to remain in Australia for as long as he was able. He remained in Australia as an unlawful noncitizen knowing that he was ignoring Australia's immigration laws. He, in effect, abandoned his children in the Philippines and provided them no financial support. As indicated above, the opening of the joint bank account by the parties less than one month after they commenced living together was an action by the parties, primarily the visa applicant, to obtain documentation to support his ultimate goal of being able to reside permanently in Australia.
46. The fact that the visa applicant appears to have entered into the relationship with the review applicant with a goal to obtain permanent residence in Australia must be a factor when considering whether the overall relationship between the visa applicant and the review applicant is genuine and whether they have a mutual commitment to a shared life together to the exclusion of all others.
47. The tribunal has considered all the evidence before it both individually and cumulatively. Although the tribunal questions the visa applicant's motive in entering the relationship with the review applicant was primarily being a means to obtain permanent residence in Australia, the tribunal is satisfied that the weight of evidence as set out above supports a finding that the parties do have a mutual commitment to a shared life to the exclusion of all others, that the relationship is genuine and continuing and they have lived together and currently do not live separately and apart on a permanent basis.
48. There is no evidence which would indicate that the parties are related by family.
49. On the basis of the above the tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application and at the time of the decision. Therefore, the visa applicant meets cl.309.211 and cl.309.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

50. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the visa applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
51. At the time of the application both parties were over the age of 18. As set out above, the tribunal is satisfied that the parties commenced living together in a de facto relationship in November 2010, more than two years prior to the visa application being filed.
52. For these reasons the tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
53. As the tribunal has found that the visa applicant meets the above criteria for the grant of the visa, the applications for the second named visa applicants are remitted so that they can be assessed in full by the department.
54. Given the findings above, the appropriate course is to remit the applications for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

55. The tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations;
 - cl.309.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).